

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ORIGINAL

Before The Honorable PHYLLIS J. HAMILTON, Judge

HADONA DIEP and RYUMEI NAGAO,)	Motion to Dismiss the
)	First Amended Complaint
Plaintiffs,)	
)	
vs.)	NO. C 21-10063 PJH
)	
APPLE INC.,)	Pages 1 - 26
)	
Defendant.)	Oakland, California
)	Thursday, August 4, 2022

REPORTER'S TRANSCRIPT OF ZOOM WEBINAR PROCEEDINGS

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Thursday, August 4, 2022

2:32 p.m.

P R O C E E D I N G S

(Zoom Webinar)

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THE CLERK: Calling civil case 21-10063-PJH, Diep, et al. versus Apple, Inc.

Counsel making an appearance, please raise your hand and please accept when it asks to be moved in as a panelist.

(Pause in the proceedings.)

THE CLERK: Counsel, please state your appearances, beginning with plaintiffs' counsel.

MR. CONN: Good afternoon, Your Honor. Elliot Conn, Conn Law PC, for plaintiffs, Hadona Diep and Ryumei Nagao, along with my co-counsel Joshua Whitaker.

MR. WHITAKER: Joshua Whitaker, Adelphi Law, present.

THE COURT: All right. Good afternoon.

MS. ORD: Good afternoon, Your Honor. Isabelle Ord on behalf of the defendant, Apple, Inc.

THE COURT: Good afternoon.

MS. DEW: Good afternoon, Your Honor. Ellen Dew also of DLA Piper on behalf of Apple, Inc.

THE COURT: All right. Good afternoon.

All right. This matter is on for hearing on the motion to dismiss filed by Apple.

And the motion goes to, I believe, all ten of the causes

1 of action that have been asserted in the complaint. And also
2 against the motion is as to plaintiff -- is it Nagow
3 [phonetic]? Nagao?

4 **MR. WHITAKER:** Nagao, Your Honor.

5 **THE COURT:** -- Nagao, based upon the -- the
6 agreement.

7 Okay. This has to do with a cryptocurrency wallet, I
8 believe. Is that the correct nomenclature?

9 **MR. WHITAKER:** That is correct, Your Honor. I wonder
10 if this is going to be as confusing as a Bumble SuperSwipe.

11 **THE COURT:** Oh, I don't -- yeah, it has the
12 potential, for sure.

13 But it looks like there are two preliminary issues, one
14 having to do with the Section 230 immunity, and one having to
15 do with the limit of liability provided by the -- I'll just
16 refer to them as the terms of use.

17 So those two preliminary issues could dispose of the
18 entirety of the case so I'd like to hear what you all have to
19 say about them. And then, of course, there is argument as to
20 each individual cause of action as well.

21 All right --

22 **MS. DEW:** Yes.

23 **THE COURT:** -- so this is Toast Plus, not Toast
24 Wallet, that's at issue, right? Or am I -- do I have those
25 confused?

1 **MS. DEW:** You have that correct, Your Honor, yes.

2 **THE COURT:** Okay. Toast Plus.

3 Okay. Now, it also seems that in terms of the plaintiffs'
4 allegations, the plaintiffs' allegations, they're -- they are
5 categorizing -- there are ten of them, there are ten claims,
6 but they fall into one of two categories. All claims don't
7 fit into the same category as far as I can see.

8 One is the actual act of Apple -- Apple's own
9 misrepresentations about the App Store being a safe and
10 trusted place for people to post their apps and to buy apps.
11 Okay. That's one. Okay, that's conduct committed directly by
12 Apple.

13 And the other aspect of the claims appear to be that Apple
14 was negligent and responsible for allowing the un- -- the --
15 for authorizing or distributing what is a fishing or a
16 spoofing app, right?

17 So the argument appears to be that Apple is responsible
18 for everything the bad actors, the third-party bad actors,
19 did, essentially that Apple stands in the shoes of those
20 third-party actors and are responsible.

21 All right. That's more derivative or a vicarious kind of
22 liability than Apple's direct statements itself.

23 So I think it's important that when we talk about the
24 causes of action, that they put be put into the right -- to
25 the right category. Okay?

1 All right. So let's start first, though, with the two
2 preliminary issues that we are all aware of. And who's going
3 to argue for Apple?

4 **MS. DEW:** Yes, thank you, Your Honor, Ellen Dew here.

5 For purposes of dividing up today's argument, with Your
6 Honor's approval, I will tackle the community --
7 Communications Decency Act argument and my colleague Ms. Ord
8 will address the balance of the arguments.

9 **THE COURT:** Okay.

10 **MS. DEW:** All right. Thank you, Your Honor.

11 Your Honor precisely went to the exact sort of crux of the
12 issue here, and that is that this case really circles around
13 plaintiffs' unfortunate interaction with a single third-party
14 app that Apple published on the App Store. And app --
15 plaintiffs now seek to hold Apple liable for the misfortunes
16 that plaintiffs incurred when they uploaded their
17 cryptocurrency into that third-party app.

18 And looking to the allegations of the complaint itself and
19 the specific conduct that plaintiffs identify and attribute to
20 Apple here, it is clear that across all of the claims, the
21 plaintiffs seek to hold Apple liable as a publisher of content
22 created by another, and that puts Apple within -- for each of
23 the claims alleged here in the complaint squarely within the
24 immunity provided by Section 230 of the Communications Decency
25 Act.

1 Now, to confirm that, Your Honor, we look no further than
2 plaintiffs' own allegations. We can start with the very first
3 paragraph of plaintiffs' complaint where they claim that Apple
4 allowed hacking by, quote/unquote, authorizing a malicious app
5 in the App Store.

6 Then they go on in paragraph 2 to say that Apple allowed
7 the application to remain in the App Store and failed to warn
8 plaintiffs and class members of a danger of the application.

9 Under the *Barnes* test from the Ninth Circuit and its
10 progeny, Your Honor, that is clearly conduct which seeks to
11 treat Apple liable as a publisher of content created by
12 another.

13 There is no allegation in the complaint that Apple
14 contributed to the content of the Toast Plus app. There is no
15 allocation [sic] in the complaint that Apple did anything more
16 than review the app before it was allowed on the App Store
17 using its vetting process.

18 And so because of that, just as Your Honor decided in the
19 *Free Kick Master* case, without an allegation that Apple
20 contributed to the content of this application, the claims are
21 subject to the CDA's immunity.

22 With respect to this first count, the CFAA claim, the
23 plaintiffs allege that the wrongdoing there by Apple was
24 allowing the Toast Plus application to be distributed on the
25 App Store. For both the federal and Maryland state Wiretap

1 Act case -- claims, the plaintiffs allege that the wrongdoing
2 there was intentionally allowing the Toast Plus application to
3 be distributed on the App Store or causing the fishing or
4 spoofing application to be published and distributed.

5 Even with respect to the UCL and CLRA claims that are
6 alleged in the complaint, Your Honor, the wrongdoing that
7 plaintiffs identify in their own allegations is offering apps
8 for download in the App Store and the unlawful or unfair or
9 fraudulent business practices that they allege are controlling
10 what applications may be sold or provided to customers through
11 the App Store through their rigorous vetting process.

12 Continuing on, even in the Privacy Act claims that
13 plaintiffs allege, they say that the personal information was
14 taken as a result of the distribution of the Toast Plus
15 application.

16 And closing it out, Your Honor, in the negligence claim,
17 they allege that Apple was negligent by failing to properly
18 vet the Toast Plus application before providing it to the
19 public.

20 Across the board, Your Honor, every single cause of action
21 seeks to hold Apple liable for content that it made available
22 on the App Store that was created by another.

23 There does not appear to be any dispute under any of the
24 other prongs of the *Barnes* test here, Your Honor. There's no
25 dispute that Apple and the App Store qualify as an interactive

1 service computer provider. And there is not any reasonable
2 dispute that this content of Toast Plus was created by anyone
3 other than a third party.

4 In fact, in their opposition brief to the motion to
5 dismiss, plaintiffs even concede that the Toast Plus
6 developers are, quote/unquote, thieves who made off with
7 plaintiffs' cryptocurrency tokens and units here.

8 So, Your Honor, for those reasons, we believe that all of
9 the claims are subject to dismissal based on the Section 230
10 of the Communications Decency Act.

11 Now, Your Honor pointed out something that came up I think
12 in the opposition which is that we believe in order perhaps to
13 evade the effect of the Section 230 immunity, plaintiffs
14 appear to be shifting their theory of the case somewhat to
15 allege that it's not Apple's publication of apps on the App
16 Store or a fail -- alleged failure in the vetting process that
17 led to their harm, but in fact Apple's own statements about
18 the App Store itself.

19 That is a different case than what's actually pled in the
20 complaint, in the amended complaint. And so we do -- for
21 other reasons, we believe that all of the claims fail for
22 other pleading deficiencies that are fatal to those claims.
23 So we do not believe these are things that can be cured
24 through amendment.

25 But even if Your Honor, as Your Honor pointed out, has

1 questions about whether there's a distinction between Apple's
2 own statements about its App Store and Apple's publication of
3 content created by another, as I just went through, in all
4 claims, Your Honor, the conduct alleged is Apple's providing
5 content created by another which falls squarely within the
6 parameters of Section 230 immunity.

7 If Your Honor has any questions about that argument, I'm
8 certainly happy to address them, but I also, in the interest
9 of time, I know we have a lot of claims to address here, so
10 that's the gist of our -- our presentation on that element.

11 **THE COURT:** Okay. All right.

12 Ms. Ord, did you want to go to any of the -- the other
13 than the Section 230 argument?

14 **MS. ORD:** Yes. Thank you, Your Honor. I will
15 address the balance of the arguments.

16 And just note for Your Honor at the beginning that I think
17 a lot of these claims end up bumping into the CDA anyway. But
18 if Your Honor was to find for any reason that CDA did not
19 apply, then we believe that each of the claims has an
20 independent fatal defect that would require its dismissal.
21 And as Your Honor correctly pointed out, the terms themselves
22 may apply to bar these claims.

23 And maybe I'll start there for Your Honor and talk a
24 little bit --

25 **THE COURT:** Okay.

1 **MS. ORD:** -- about the terms since that's one of the
2 issues you asked us to touch on.

3 And to do that, I would say, first of all, that there are
4 terms and conditions that are applicable to both of the
5 plaintiffs in this case. I think it's undisputed, based upon
6 the allegations of the complaint, the plaintiffs did enter
7 into those terms, two different sets of terms, but they're
8 essentially the same language. One is the Japanese set of
9 terms for Mr. Nagao and one is the U.S. set of terms for
10 Ms. Diep.

11 However, if you look at what those terms -- [technical
12 issue with the Zoom audio] -- they clearly point out from the
13 beginning when you begin your interaction with the App Store,
14 the way that you get -- [technical issue with the Zoom
15 audio] -- terms and conditions is you have to agree to them
16 before you can integrate into and use the App Store.

17 So you know from your very first interaction that these
18 are the terms that will govern your experience within the App
19 Store. And they contain a couple of important disclosures.
20 Those disclosures include a representation that Apple is not
21 responsible for the conduct of third parties when you engage
22 with them on apps and things that you choose to participate in
23 from the App Store.

24 Part of this again bumps into Ms. Dew's CDA argument, but
25 it's also a clear articulation that Apple is not responsible

1 for what happens with a third party once Apple is no longer a
2 part of that transaction, and that you are in fact proceeding
3 at your own risk when you engage with those third parties.

4 And if Your Honor were to find that those terms apply,
5 then we believe that that would bar all of the claims.

6 Now, Your Honor said at the beginning that there was
7 perhaps a way to break these claims down into two buckets,
8 those that might relate to Apple's conduct and those which
9 might relate to the plaintiffs' -- to the third-party conduct
10 of the malicious application.

11 I'd actually like to push back on that a little bit.
12 Because I believe the way that the complaint is stated, there
13 are tendrils of flavors in there of an idea that somehow Apple
14 has independent liability, but that's just not how these
15 claims are pleaded. The complaint does not allege that Apple
16 has made any representation that is not true. In fact, the
17 App Store is a safe and secure place and we stand by that.

18 And the experiences that plaintiffs have had have, for the
19 most part, been positive except for this one interaction with
20 a third-party application once it was no longer a part of the
21 transaction with Apple.

22 Plus, Your Honor, we believe that there are serious
23 Rule 9(b) issues here. To the extent that anyone was going to
24 attempt to assert any kind of fraud-based claim against Apple
25 under any of these legal theories, they would need to meet the

1 heightened pleading standards of Rule 9(b), the who, the what,
2 the where, the when. And while there are sort of throwaway
3 statements in the complaint that plaintiffs may have seen
4 certain statements over time, perhaps over a long period of
5 time without the App Store being a safe, secure place and a
6 place that you can enjoy using apps, there is not a single
7 allegation in the complaint that says what the plaintiffs
8 viewed, when they viewed it, how they viewed it, what action
9 they took based upon that representation or even that it was
10 any of the representations that have been listed in the
11 complaint. In fact, they say it could have been perhaps a
12 similar statement, not even the one that they have listed in
13 the complaint.

14 So I think at that point we have to stop there and say
15 there isn't even a misrepresentation claim that could be
16 brought here, which means Your Honor actually at this stage
17 doesn't even have to get to the issue of whether the terms
18 would apply to Apple and its own conduct because that claim
19 has not been alleged and is not before the Court.

20 **THE COURT:** Okay.

21 **MS. ORD:** I'd be happy to touch on the individual
22 defects in the various other causes of action if this is the
23 appropriate spot to do it.

24 **THE COURT:** With regard to Mr. Nagao's claims, he's
25 bound, governed by the Japanese terms, correct?

1 **MS. ORD:** Yes, Your Honor, that's --

2 **THE COURT:** Okay. Your argument is overall
3 Section 230 immunizes Apple against all the claims but --

4 **MS. ORD:** Correct.

5 **THE COURT:** -- in addition to that or alternatively,
6 at least with regard to Mr. Nagao, he's governed by the
7 Japanese terms, right?

8 **MS. ORD:** Yes, Your Honor.

9 **THE COURT:** Which means that Apple is not the
10 appropriate defendant for any claims that he might have.

11 **MS. ORD:** That's correct, Your Honor. Apple, Inc.,
12 the currently named defendant, is not the correct defendant.
13 It's not a mystery who the correct defendant is. The name is
14 in his terms. It's the Japanese entity. And otherwise the
15 terms are exactly the same. But the claim should be dismissed
16 because he has not sued the proper entity.

17 **THE COURT:** Okay. Okay.

18 I actually don't need to hear argument on the individual
19 causes of action. It's really the two overarching preliminary
20 issues that I think are most critical here.

21 So how about if I hear from plaintiffs, and then
22 defendants get to respond since its their motion.

23 **MR. CONN:** Thank you, Your Honor.

24 If it's all right with the Court, I'll be addressing the
25 CDA and the prospective waiver rights. And my colleague will

1 address Mr. Nagao's standing.

2 **THE COURT:** Okay.

3 **MR. CONN:** With respect to the overarching -- I guess
4 with respect to the buckets the Court has put this into, we
5 intend --

6 (Audio distortion.)

7 **THE COURT:** Your sound is not great.

8 **MR. CONN:** I apologize. Is this better?

9 **THE COURT:** Yeah.

10 **MR. CONN:** With respect to the -- the two buckets
11 that the Court had -- the claims into, I would say that there
12 is a third bucket, which would be the -- Apple's negligence in
13 failing to properly vet the claim. But beyond that --

14 **THE COURT:** I'm sorry, I -- I can't hear -- I didn't
15 understand that either.

16 (Pause in the proceedings.)

17 **THE COURT:** Mr. Conn, you're going to need to speak a
18 little more clearly.

19 **MR. CONN:** I apologize, Your Honor. We're all at
20 home quarantining right now with COVID.

21 **THE COURT:** Oh, I'm sorry.

22 **MR. CONN:** Your Honor, I would proffer that there's a
23 third bucket of claims as well which is Apple's failure to
24 recognize the -- and properly vet this specific app in
25 addition to its own misrepresentations or its liability for --

1 for the -- the app itself.

2 But as under the Communications Decency Act, the immunity
3 is limited to -- to, one, Apple's conduct as publisher, but
4 also by the statute itself. It doesn't apply to -- to the --
5 half our causes of action.

6 Section 230(e)(1) says the statute has no effect on
7 criminal law. Both of the federal statutes we raise are
8 criminal statutes. Section 230(e)(4) says there's no effect
9 on communications privacy laws including the Communications
10 Privacy Act or any similar state law. And --

11 **THE COURT:** I'm sorry. Which -- you're asserting two
12 criminal law violations against Apple?

13 **MR. CONN:** Yes. The -- the Electronic Communication
14 Privacy Act and the Computer Fraud and Abuse Act are both
15 federal criminal statutes.

16 **THE COURT:** Huh. I don't -- when they're asserted in
17 a civil case, we don't treat them as though they're criminal
18 statutes. I mean, criminal statutes can only be enforced by
19 the government.

20 I look at those as -- as civil. You're seeking civil
21 penalties, are you not?

22 **MR. CONN:** We are. But regardless the
23 Section 230(e)(4) explicitly exempts the Electronic
24 Communications Privacy Act from Section 230 immunity.

25 **THE COURT:** Okay. Okay.

1 **MR. CONN:** Now, the remainder of the claims, we're
2 not seeking to hold Apple liable as a publisher, but we're
3 seeking to hold Apple liable for its own misrepresentations.
4 But that's clear in section -- paragraph 2 of the complaint
5 where we say specifically plaintiffs and class members rely on
6 Apple's longstanding campaign of representing that its App
7 Store is a safe and trusted place and download the Toast Plus
8 app.

9 **THE COURT:** That's in paragraph 2 --

10 **MR. CONN:** Yes.

11 **THE COURT:** -- of the complaint?

12 **MR. CONN:** Of the first amended complaint.

13 **THE COURT:** Oh, of the first amended complaint. Let
14 me pull that up.

15 (Pause in the proceedings.)

16 **THE COURT:** Hmm. Okay.

17 **MR. CONN:** And so if you move on to paragraph 14 of
18 the complaint, we -- we explicitly identify one of the
19 misrepresentations that -- that remains today on the front of
20 the -- the App Store: The App Store has proved for well over
21 a decade to be a safe and trusted place. We offer nearly
22 2 million apps and we want you to feel good about using every
23 single one of them.

24 We've also alleged, and this has been an ongoing campaign
25 and per the *In re Tobacco* cases when consumers are exposed to

1 longstanding campaigns, the -- the requirements for -- for
2 pleading UCL for fraud are relaxed. But we -- we have alleged
3 the who, what, where, when, why, and how of Apple. The who
4 being Apple. The what being this representation of absolute
5 safety for each and every single app. The when and over the
6 past 10, 20 years. And the how is set forth in the complaint.

7 But at the end of the day, what Apple is trying to argue
8 is that these Apple customers who've relied on this
9 longstanding campaign of Apple's absolute guarantee of safety
10 in its products and services, including each and every single
11 one on the app, who have suffered significant damages --
12 Mr. Nagao rendered hundreds of thousands to millions,
13 depending on the price of Ripple a day -- have absolutely no
14 recourse against Apple.

15 And -- and Apple's simply wrong. Their waiver of
16 liability really fares no better. It's longstanding in
17 California that the state statutes we sued under are
18 unwaivable. The California Supreme Court in *McGill vs.*
19 *Citibank* case made clear you can't waive unfair competition
20 law or CLRA claims.

21 **THE COURT:** Do you have -- do you have any cases you
22 can cite in which a court has found that Apple is responsible
23 for third-party apps who cheat the customers who purchase the
24 apps from the App Store?

25 **MR. CONN:** Um, Your Honor --

1 (Simultaneous colloquy.)

2 **THE COURT:** I mean because Apple's involvement
3 essentially was hosting this app on the App Store, making it
4 available for purchase. It does not appear to still be in the
5 App Store. At least I looked in the App Store yesterday and I
6 couldn't find it.

7 But so for a period of time, it hosted --

8 **MR. CONN:** And it guaranteed --

9 **THE COURT:** -- in its store.

10 Now where would I find -- where would I find any sort of
11 guarantee that everything that's sold in the App Store is
12 legitimate?

13 **MR. CONN:** That -- on the front of the App Store.

14 **THE COURT:** On the front of the App Store?

15 **MR. CONN:** Yes, apple.com/app-store.

16 The representation that's set forth in paragraph 14 is the
17 first block of text.

18 "For over a decade, the App Store has proved to be a safe
19 and trusted place to discover and download apps. But the
20 App Store is more than just a storefront, it's an innovative
21 destination focused on bringing you amazing experiences. And
22 a big part of those experiences is ensuring that the apps we
23 offer are held to the highest standards for privacy, security,
24 and content. Because we offer nearly 2 million apps, and we
25 want you to feel good about using every single one of them."

1 **THE COURT:** Okay.

2 **MR. CONN:** In fact, as we've alleged in 2007, Steve
3 Jobs said that the mission created in the App Store was to
4 create an advanced system which will offer developers broad
5 access to natively program the iPhone's amazing software
6 platform while at the same time --

7 (Audio distortion.)

8 **MR. CONN:** I'm sorry.

9 To natively program the iPhone's amazing software platform
10 while at the same time protecting users from malicious
11 programs.

12 **THE COURT:** Um-hmm.

13 **MR. CONN:** Apple didn't have to say every single one
14 of our apps will be safe, but they chose to.

15 **THE COURT:** Did they -- did they say every single one
16 of our apps is safe?

17 **MR. CONN:** We want you to be -- to feel good about
18 using every single one of them.

19 **THE COURT:** But want to use -- so good about using
20 them is not the same thing as every single one of them is
21 safe.

22 **MR. CONN:** In the context of that paragraph where
23 they said the app store is proved to be a safe and trusted
24 place, and the apps we offer are held to the highest standards
25 for privacy, security, and content.

1 **THE COURT:** Okay. Okay.

2 **MR. CONN:** And so based off of these longstanding
3 campaigns of representations, we've alleged that the name
4 plaintiffs and the name class members purchased, used Apple
5 products, and downloaded this malicious app trusting it to be
6 safe because Apple said it was. And they lost significant --
7 significant amount of money as a result.

8 **THE COURT:** Okay. All right.

9 **MR. CONN:** Um --

10 **THE COURT:** Anything with regard to the terms?

11 **MR. CONN:** As for the -- nothing beyond the fact,
12 Your Honor, that we cite ample case law showing that you
13 simply can't waive these claims.

14 The only cases they've cited to the contrary were -- dealt
15 with a limited claim, whether a waiver -- or whether a
16 prospective waiver itself stayed a claim for
17 unconscionability. And we have not brought a separate cause
18 of action for unconscionability.

19 **THE COURT:** Okay. All right. Thank you.

20 **MR. CONN:** Thank you, Your Honor.

21 **THE COURT:** With regard to Mr. Nagao, what's your
22 argument?

23 **MR. CONN:** I will let my co-counsel handle that one.

24 **THE COURT:** All right. Mr. Whitaker?

25 **MR. WHITAKER:** Thank you, Your Honor.

1 It's very simple. In fact, Mr. Nagao used the App Store
2 to download the app. He relied on Apple's representations on
3 the App Store. He used an Apple device.

4 At this stage, you know, the fact of the matter is, is
5 that Apple is the party that's hosting the application on its
6 server, not this JK Tunes Corporation.

7 So given the fact that -- that this case largely turns on
8 the fact that Apple represented that -- that two million apps
9 were safe and one of them caused our client to lose nearly a
10 million dollars, it's Apple's representations that this case
11 turns on.

12 **THE COURT:** Okay.

13 **MR. WHITAKER:** And the effect of -- the effect of
14 dismissal would effectively be -- I mean they're the same
15 terms. He would still have to bring the case in California
16 against -- against what appears to be a Japanese entity.

17 The entity didn't make those representations. The entity
18 did not host the app. The entity did not fail to properly vet
19 the app or remove the dangerous app after it was on notice of
20 the dangerous condition.

21 I mean the -- the fact of the matter is, is that the --
22 the -- all of the nexus of the conduct at issue here was
23 Apple, not this Japanese entity.

24 **THE COURT:** Hmm. Okay. All right.

25 All right. Then brief response, Ms. Dew or Ms. Ord?

1 **MS. ORD:** I'll start, Your Honor, if that's all
2 right. And then Ms. Dew will close us out on the CDA
3 argument.

4 But briefly, I think Your Honor has correctly
5 conceptualized what's going on here. You said there's no
6 guarantee, and that's right. But it is a safe and secure
7 place. We a hundred percent stand by those representations.

8 There's just nowhere in their complaint that meets the
9 bare minimum requirements of establishing that there's a false
10 statement or any of the requirements for Rule 9(b).

11 In the *Depot, Inc. v. Caring for Montanans* case, which is
12 a Ninth Circuit case, it's clear that they must state the
13 circumstances of the fraud including an account of the time,
14 place, and specific content of the false representation and
15 the identity of the parties to the misrepresentation, which
16 then brings us to this reliance issue.

17 And we're looking back at statements from Steve Jobs from
18 ten years ago. Obviously nobody relied on those statements
19 from ten years ago. They have to tell us what statement they
20 saw and why it was reasonable to rely upon it, and those facts
21 are just not present in the complaint.

22 The closest they come is paragraph 16 where they say on
23 information and belief that the plaintiffs saw representations
24 of safety and security or ones materially similar in content
25 to them. But we don't know which ones they are, we don't know

1 when, and we don't know any of the other circumstances about
2 that. And obviously --

3 **THE COURT:** I believe counsel pointed to
4 paragraph 14.

5 **MS. ORD:** Yes, Your Honor. Paragraph 14 has a
6 general statement of what the App Store says which we stand
7 by, but there's no allegation that any plaintiff actually saw
8 those representations, those specific representations, when
9 they did, or what action, if any, they took upon those
10 representations.

11 There's no allegation that they relied upon those
12 representations in entering into the App Store as a whole,
13 which is a safe and secure environment, or in deciding to
14 download this particular app.

15 And of course once they did download the app, they're
16 dealing with a third party and not with Apple anymore.

17 So there's just no reliance in this idea of somehow just
18 having statements out there for a long time that nobody ever
19 relied upon is not enough to state any claim, let alone to
20 satisfy Rule 9(b).

21 And in particular, Your Honor, you mentioned something
22 about something a purchase. There is in fact no purchase
23 here. The App Store where this app was present is free to
24 enter once you sign up for our terms, and this app was free to
25 download. So this independently kills your CLRA claim because

1 there is no good or sale transaction. And it kills the
2 restitution prong of the UCL because there's no money to
3 disgorge. And as Your Honor correctly noted, the app is down,
4 so there's no basis for injunctive relief either.

5 **THE COURT:** Hmm. Okay. All right.

6 Ms. Dew, on the CDA argument and Mr. Conn's suggestion
7 that Section 230 doesn't apply to the second cause of action?

8 **MS. DEW:** Yes, Your Honor. Thank you.

9 On that point, Your Honor, I think what's important and
10 what the case law tells us, both *Barnes* and its progeny, is
11 that you looked at the conduct alleged, not the specific
12 theory of liability under which it is alleged.

13 So what plaintiffs are trying to do here, as I understand,
14 is to use the Computer Fraud and Abuse Act and the Wiretap
15 Acts as a way of avoiding the -- the immunity afforded by the
16 CDA based on conduct that simply does not fit a claim under
17 those statutes, right?

18 There is no allegation here that Apple engaged in any
19 criminal conduct. And as Your Honor rightly pointed out,
20 we're here in the context of a civil case. This is not an
21 allegation that Apple has engaged in any criminal behavior.

22 There's no allegation that Apple actively participated in
23 any hack of any device whatsoever as required to state a claim
24 under the CFAA. There's likewise no allegation that Apple
25 actually intercepted any of the cryptocurrency here.

1 To the contrary, plaintiffs concede that the
2 cryptocurrency was intercepted by, quote/unquote, thieves who
3 were the Toast Plus developers. So plaintiffs cannot avoid
4 the effect of CDA immunity simply by trying to plead a claim
5 that is an ill fit for the conduct alleged here.

6 The conduct alleged here is that the plaintiffs downloaded
7 an app from the App Store. That was their interaction with
8 Apple. Subsequent to that interaction, they later, in a
9 separate transaction, uploaded the app -- the cryptocurrency
10 tokens directly into the third-party app. And at that point
11 or at some later point, the developers of that app stole their
12 cryptocurrency. It's a terrible and unfortunate circumstance,
13 but that is not -- it is not a circumstance for which Apple
14 can be held liable.

15 And, Your Honor, to the point just briefly where
16 plaintiffs allege that they have a failure to warn claim and
17 that should allow them to survive here and avoid the immunity
18 afforded by the CDA, failure to warn has also -- it's well
19 established that that is also something that is subject
20 with -- to the immunity afforded by the CDA because that's
21 precisely what the legislature wanted, interactive computer
22 providers to do here, they wanted them to take down these
23 apps, and so they had to find a way to avoid penalizing them
24 for not necessarily catching every app.

25 And if we look at the *Ripple Labs v. YouTube* case, Your

1 Honor, out of this court in 2020, the court found that CDA
2 immunity applied even though YouTube, the defendant there,
3 failed to take down allegedly fraudulent channels after being
4 notified that they were -- that they were fraudulent. That is
5 precisely the same situation as plaintiffs' theory of
6 liability under a failure to warn here.

7 There is simply no allegation that Apple contributed to
8 the content of this app or that Apple participated in the
9 theft of plaintiffs' cryptocurrency. And for that reason,
10 every single claim alleged here falls within the scope of CDA
11 immunity and the complaint must be dismissed.

12 **THE COURT:** All right. Thank you.

13 All right. The matter stands submitted. We'll issue a
14 written order. Thank you.

15 **MR. CONN:** Thank you, Your Honor.

16 **MS. ORD:** Thank you.

17 **MS. DEW:** Thank you, Your Honor.

18 **THE COURT:** We're adjourned.

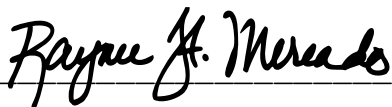
19 **MR. WHITAKER:** Thank you, Your Honor.

20 (Proceedings were concluded at 3:07 P.M.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.



Raynee H. Mercado, CSR, RMR, CRR, FCRR, CCRR

Saturday, December 10, 2022